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Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors

Bryan M. Seiler

Note

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Monica is a mother of four who lived in a duplex with her fiancé, Shawn.[1] The African American family resided in a predominantly white urban neighborhood. Early in their tenancy, the family discovered by way of threats from neighbors that the white property owners were meeting to discuss tactics for evicting them. When the family confronted a neighbor who was spreading rumors that they were dealing drugs, the neighbor timidly repeated the assertions and the discussion ended with a request by the family to stop spreading the rumors. A few hours later, police arrived at the scene, responding to a phone call by the neighbor that the family had violently threatened him. The police briefly investigated but did not file a charge.

A few weeks later, the family received a letter from the city's Problem Properties Unit stating that the city was revoking the property's rental registration. The letter cited the neighbor's police call as the sole ground for revocation. The letter also informed the family that they could appear at a city hall administrative hearing to contest the charges. The family panicked, since they had to find replacement housing quickly or lose their Section 8 assistance.[2] After weeks of fruitless at-

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1. This example is based on a case the author worked on as a summer law clerk with a Minnesota Legal Services program in 2006. Clients' names have been changed to protect their identities.

2. *See* U.S. DEP'T OF HOUSING & URBAN DEV., HOUSING CHOICE VOUCH-

tempts to locate affordable rentals with space for their family, Monica called legal aid as a last resort. Since the city's charges failed to meet both the substantive legal and notice requirements of the city's public nuisance ordinance, legal aid attorneys pressured the city attorneys to drop the charges. This legal vindication came with few tangible benefits for the family, however; they were still forced to move because they had transferred their Section 8 voucher to another property during their hurried search for replacement housing.

Monica and Shawn's story is hardly unique. Local governments across the United States are increasingly enacting and ramping up enforcement of public nuisance laws to tackle not only "problem properties" like Monica and Shawn's,[3] but also urban blight more generally,[4] excessive noise,[5] annoying pets,[6] gangs,[7] drug use,[8] sex offenders,[9] and suspicious hangouts.[10] In his seminal sociolegal essay *Why the "Haves" Come Out Ahead:*

ER PROGRAM GUIDEBOOK ch. 8, 8-11 to 8-14 (2001), *available at* http://www.hudclips.org/sub_nonhud/html/pdfforms/7420g08.pdf (setting forth guidelines for voucher expiration after issuance). The Section 8 Program provides housing choice vouchers to very low-income families as well as elderly and disabled individuals. 24 U.S.C. § 982 (2000).

3. *See* Bruce Cadwallader, *The Challenge of Enforcement*, COLUMBUS DISPATCH, Nov. 18, 2002, at A1; *N. Tonawanda May Close Building as a Nuisance*, BUFFALO NEWS, Aug. 11, 1998, at B4.

4. *See* Doane Yawger, *Inspectors on Lookout for Blight, Eyesores*, MERCED SUN-STAR, Dec. 25, 2004, at 3.

5. *See Random Inspirations, Observations, Ruminations*, BALT. SUN, Nov. 3, 2005, at 1B.

6. *See* Chris Hedges, *Standing up for Pets and Their Humans*, N.Y. TIMES, Feb. 26, 2004, at B2.

7. *See* Matthew Mickle Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 411 (1999) (exploring California's use of public nuisance law as an anti-gang measure); Jessica Garrison & Zeke Minaya, *Judge OKs South L.A. Apartment Evictions*, L.A. TIMES, Dec. 15, 2004, at A1 (describing a recent decision to evict all tenants from a gang-dominated apartment building).

8. *See* Kimberly O'Brien, *Reclaiming Chapman Avenue*, ROANOKE TIMES, Oct. 29, 2000, at A1 (discussing the city's Drug Blight ordinance and its invocation to pressure landlords to evict tenants for drug use); David Owens, *City Wants to See Bar Closed*, HARTFORD COURANT, Nov. 24, 1999, at B1.

9. *Oakland Closing Down House Sheltering Sex Offender*, DAILY REVIEW (Hayward, Cal.), Mar. 16, 2004 [hereinafter *Oakland*].

10. *See* Stewart Ain, *Town Takes Different Tack to Shut Down a Hotel*, N.Y. TIMES, Apr. 22, 2007, at 6; Russ Buettner & Ray Rivera, *For Owners of Club in Police Shooting Case, Years of Raids and Suits*, N.Y. TIMES, Dec. 3, 2006, at 45; Dean Solov & Kenneth Knight, *Police: Glut of Arrests Led to Evictions*, TAMPA TRIB., Nov. 26, 1998, at 8.

Speculations on the Limits of Legal Change, Mark Galanter hypothesizes that the legal experience of the parties, which he characterizes as "one shotters" and "repeat players," plays a fundamental role in their success in the legal system generally.[11] His conclusion about the systemic bias of the legal system is every bit as applicable to the public nuisance laws that pit the resources of powerful state actors against unorganized and often economically disadvantaged defendants.

This Note proposes statutory reforms at the state and local level to eliminate the undesirable legal and social consequences of current uses of public nuisance statutes. In addition, this Note sets forth an accompanying private attorney general prosecution structure to reintroduce market mechanisms and prevent abuse by overeager neighbors. Part I introduces the common law origins of nuisance law, the evolution of the doctrine in cities during the Progressive Era, and the usage of nuisance law in the modern urban renewal context. Part II argues that the current use of public nuisance law by cities as a civil injunctive remedy is unsound in both its assumptions and methodology; violative of modern takings jurisprudence; contrary to economic efficiency; ineffective as an urban renewal strategy; and unable to safeguard the vulnerable populations it claims to protect.

In light of these deficiencies, Part III begins by suggesting three short-term changes to public nuisance law: suspending publicly brought civil actions,[12] temporarily deregulating the barriers for private parties, and incorporating uniform procedural and legal protections. The next Section outlines a public-private partnership to decrease the enforcement gap caused by the short-term solutions by requiring private actors to account for the economic consequences of the decision to prosecute public nuisances. The Note concludes by reiterating the imminent need for drastic public and private sector reforms to reduce abuse of public nuisance statutes and allocate public resources more efficiently and equitably.

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11. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, *in* IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 14 (Herbert M. Kritzer & Susan S. Silbey eds., 2003).

12. This term is defined in Part I.C.3.b below to refer to public nuisance actions brought by public actors in civil courts.

I. URBAN PUBLIC NUISANCE LAW: PAST AND PRESENT

Any discussion of nuisance law must acknowledge Dean Prosser's well-known axiom that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'"[13] All jurisdictions in the United States have criminal statutes that encompass public nuisances without defining them, or, "at most," provide "a very general and rather meaningless definition."[14] Law enforcement agencies can impose drastic penalties on landlords with perceived problem tenants—most jurisdictions allow police to shut down properties for up to a year or revoke rental certifications indefinitely without compensation.[15] Tenants' ability to contest the claims against them is diminished by the deference appellate courts give to lower courts and administrative bodies in nuisance enforcement.[16] The result of this lack of clarity is the indiscriminate use by cities and private citizens of this powerful tool for order control and neighborhood redefinition.

A. COMMON LAW ORIGINS AND DEVELOPMENTS

The legal meanings of the word "nuisance" are plenary and at the same time elusive.[17] The first documented legal use of "nuisance" was in the twelfth century.[18] The cause of action "provid[ed] redress for interference with the use and enjoyment of plaintiff's land resulting from acts committed on the defendant's land."[19] Many litigants chose to invoke nuisance law because of the availability of injunctive relief instead of simply

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13. WILLIAM L. PROSSER & W. PAGE KEETON, THE LAW OF TORTS 616 (5th ed. 1984).

14. *Id.* at 646.

15. *See, e.g.*, City of Mankato v. Mahoney, 542 N.W.2d 689, 692–93 (Minn. Ct. App. 1996) (overturning a city council determination as arbitrary and capricious but alluding to a Minnesota statute allowing a sixty-day revocation of the rental certificate). *But see* City of Seattle v. McCoy, 4 P.3d 159, 161 (Wash. Ct. App. 2000) (finding unconstitutional as applied to property owners a statute allowing a one-year shut-down period for problem properties).

16. Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 20 (2004) (describing the flexibility of public nuisance actions that makes them such a popular order control technique).

17. *See* Jeremiah Smith, *Torts Without Particular Names*, 69 U. PA. L. REV. 91, 109–12 (1921) (describing the frequent meaninglessness of the term "nuisance").

18. Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 192–93 (1990).

19. *Id.* at 193.

monetary damages.[20] The divide between equitable and monetary relief led to distinct and sometimes conflicting standards with other actions, such as the requirement that the dispute involve a freehold estate and that the wrong be by another freeholder.[21] Courts later added to the confusion by creating a right for plaintiffs to seek redress for interference with a public right, traditionally a criminal action known as a public or common nuisance.[22] These conflicting standards led to a brand of writ-shopping that ultimately resulted in a split between the courts of law and equity.[23]

During the American Revolution, the operating rule in nuisance cases was one of absolute protection for landowners.[24] However, the major economic shift from agriculture to manufacturing following the Civil War increased land-use conflicts and caused corresponding shifts in nuisance law to favor economic development.[25] Courts chipped away at private nuisance actions by creating subsidiary doctrines such as statutory justification and the special injury requirement to protect industrial actors.[26] Courts also increasingly hesitated to award injunctive relief to landowners, especially where damages had not yet occurred.[27] These entitlement approaches to resolving land use conflicts—those that allocated rights absolutely to either landowners or industry—were ultimately unsuccessful, setting the stage for modern nuisance law's utilitarian approach.[28]

B. LEGISLATIVE EXPANSION AND REDEFINITION

By the mid-1800s, many state legislatures had codified their public nuisance law and were expanding the law to fit the

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20. *Id.* at 194.

21. *Id.* at 193–95.

22. *Id.* at 195.

23. *See id.* at 194 (describing the development of each kind of writ and citing litigants' freedom to choose between them).

24. *Id.* at 196–97. This acceptance likely stems from the fact that Blackstone's *Commentaries* were "the primary source of legal authority in post-colonial America," and Blackstone favored absolute protection for landowners. *Id.* at 196.

25. Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 670 (1976).

26. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 74–80 (1977); Kurtz, *supra* note 25, at 629–51; Lewin, *supra* note 18, at 197.

27. Kurtz, *supra* note 25, at 630–38.

28. Lewin, *supra* note 18, at 200–12.

changing social landscape.[29] This development changed the role of courts in deciding public nuisance disputes and also pushed the boundaries of what state legislatures could define as public nuisances. *Mugler v. Kansas*[30] was the first Supreme Court case to address this trend of legislative expansion and set the stage for future disputes over the legal limits of public nuisance law.

1. Codification of the Common Law and the Role of Legislative Discretion

In *Mugler*, the court examined Kansas's utilization of public nuisance law to prevent both production and consumption of alcohol as codified in its liquor abatement laws.[31] The combined case involved an appeal from a citizen convicted of manufacturing beer without a license, as well as the state's appeal from the dismissal of a declaratory nuisance action against the owner of a brewery.[32] Opponents claimed Kansas's revision of public nuisance law to forbid the production and consumption of alcohol violated the Fourteenth Amendment's Privileges and Immunities and Due Process Clauses by altering the property rights of the owners without legal process.[33] The building owners further claimed that the loss in property value of their brewery constituted a regulatory taking requiring compensation.[34]

The Supreme Court found that the Kansas laws were constitutional as long as the statutorily defined public nuisance ordinances attempted to protect against injuries to the health, morals, or safety of the community.[35] Further, the Court held that states were not required to compensate landowners for exercises of their police power.[36] This broad holding enabled state legislatures to redefine and apply nuisance law as a social control technique, foreshadowing the Progressive Era reforms.[37]

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29. *See* PROSSER & KEETON, *supra* note 13, at 643–66 (describing the historical evolution of public nuisance law).

30. 123 U.S. 623 (1887).

31. *Id.* at 653.

32. *Id.*

33. *Id.* at 657.

34. *Id.* at 664 (arguing for compensation, but not explicitly addressing the Fifth Amendment because of the undeveloped state of takings legal standards).

35. *Id.* at 668–69.

36. *Id.*

37. Peter C. Hennigan, *Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era*, 16

2. The Progressive Era Experiment and Urban Reorganization

The Progressive Era represented an important shift in urban public nuisance law. In the early twentieth century, most American cities contained red-light "vice districts" where prostitution, gambling, and other illegal activities thrived with little police interference.[38] Growing concern over the moral and social problems created by these activities spurred attempts to shut down these "immoral" centers.[39] Faced with widespread police complacency and little confidence in public actors to enforce the laws, reformers fought for legislation to give citizens the power to deal with social ills through public nuisance laws.[40]

By 1919, forty-one states had enacted nuisance laws to eradicate the red-light districts within their borders.[41] Modeled after the earlier liquor abatement laws employed by Iowa and Kansas, the so-called Red Light Abatement ordinances operated by giving private individuals standing to bring public nuisance actions and by eliminating the common law requirement of "special injury" for private actions on behalf of the public where the government was not bringing a criminal action.[42]

Despite broad public support for Progressive Era nuisance reforms, opponents argued that making public nuisance a private action eviscerated the distinction between public and private law[43] and threatened a loss of civil liberties and procedural protections. Nevertheless, reformers convinced legislatures to waive these barriers. By the early 1920s, nearly all of the red-light districts were eliminated, a testament to the dispersive power of public nuisance law.[44] Though the popular Red Light Abatement laws were never legally challenged, the trend of leg-

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YALE J.L. & HUMAN. 123, 137–46 (2004).

38. *Id.* at 125–26.

39. THOMAS C. MACKEY, RED LIGHTS OUT: A LEGAL HISTORY OF PROSTITUTION, DISORDERLY HOUSES, AND VICE DISTRICTS, 1870–1917, at 121–23 (1987); *see also* Hennigan, *supra* note , at 126 (arguing that the focus on eradicating red-light districts was spurred primarily by a public reconception of the prostitute from a "fallen woman" to a "white slave," a victim of circumstance forced into a dangerous trade).

40. Hennigan, *supra* note , at 125–27, 147.

41. *Id.* at 126–27.

42. MACKEY, *supra* note , at 126–27.

43. *Id.*

44. Hennigan, *supra* note , at 127. However, prostitution and other illegal activities continued in most cities, albeit in a more dispersed manner. *Id.* at 196. Some argue that the activities were shifted to more marginalized but equally concentrated vice districts in African American neighborhoods. *Id.*

islative expansion would eventually force courts to consider the proper limits of nuisance law.

C. *PENNSYLVANIA COAL* AND THE JUDICIARY'S RETREAT FROM ABSOLUTE DEFERENCE

As *Mugler* and its progeny make clear, states and localities traditionally enjoy broad discretion in the exercise of their police power and property regulation.[45] Autonomy without judicial review, however, can be dangerous. States can and often do use nuisance law to pursue injunctive remedies for "crimes" that fall outside of traditional criminal actions.[46] The relatively low stakes involved in individual property disputes encourage this use. In fact, urban order-disturbance problems are the most frequent source of public nuisance litigation.[47] In the years following the Progressive Era, however, the Court retreated from its initial standard of absolute legislative deference[48] and established important definitional and constitutional limitations on the application of public nuisance law. While the principles of judicial review are limited, they are every bit as applicable today as when Justice Oliver Wendell Holmes, Jr. pierced the veil of complete local autonomy.

1. The Definitional Limits of Nuisance Law

Due to the powerful injunctive measures associated with nuisance actions, courts have good reason to be suspicious of creative nuisance statutes. In the 1922 case *Pennsylvania Coal Co. v. Mahon*,[49] the plaintiffs sought injunctive relief under a state law that forbade "the mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation."[50] Looking to the common law, Justice Holmes reasoned that a source of damage to a single private house is not a public nuisance, even if similar damage is inflicted on others in different places.[51]

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45. 123 U.S. 623, 668–69 (1887).

46. *See* Werdegar, *supra* note 7, at 411 (noting California's use of public nuisance law to prevent suspected gang members from engaging in legal activities, such as congregating in public or carrying pagers and cell phones).

47. *See* PROSSER & KEETON, *supra* note 13, at 644.

48. Barbian v. Panagis, 694 F.2d 476, 485 (7th Cir. 1982).

49. 260 U.S. 393 (1922).

50. *Id.* at 412–13.

51. *Id.* at 413–14.

Justice Holmes placed the law outside of the common law definition of public nuisance because the damage to a single private home does not constitute a public nuisance.[52] He then held that the law exceeded the valid exercise of police power and overturned the appellate court's grant of an injunctive order to prevent mining in a manner that causes subsidence of land.[53] *Pennsylvania Coal* thus provides guidance for modern nuisance law: though states and localities enjoy a great deal of latitude in their property control, courts must be suspicious of redefinitions of nuisance law that stray from the traditional common law definitions of public nuisance.[54] The special deference given to nuisance law only extends so far as the common law definition of nuisance logically supports. Beyond that, states proceed at their own peril, though admittedly appellate courts seldom venture into this realm of uncertainty for fear of encroaching on traditional state powers.[55]

2. The Takings Clause: An Exception and Implicit Limitation

In many jurisdictions, only a public official may sue for a public nuisance, absent a special injury.[56] But the fact that a law regulates property for the perceived common good does not place it outside of the Fifth Amendment's protection against takings without just compensation.[57] Rather, courts interpreting the Takings Clause[58] assume that the property regulation is in the public interest and nevertheless subject the regulatory action to scrutiny.[59] Thus, while the Takings Clause reserves broad leeway for state regulation of property and exercise of po-

52. *Id.* at 415–16.

53. *Id.*

54. *Id.*

55. *See* Garnett, *supra* note , at 23 ("As a matter of federal constitutional law, it is well established that nonconfiscatory land-use regulations are subject to rational basis review—that is, they will be upheld if the court is satisfied that some conceivable government interest justifies the governmental policy.").

56. *See* RESTATEMENT (SECOND) OF TORTS § 821C (1979).

57. *Pennsylvania Coal*, 260 U.S. at 415 ("The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation."(citing U.S. CONST. amend. V)).

58. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

59. *Pennsylvania Coal*, 260 U.S. at 413.

lice power, states must also take care to ensure that their nuisance laws do not transgress the limits of takings law.

The Supreme Court's groundbreaking and oft-criticized decision in *Lucas v. South Carolina Coastal Council* changed the landscape of takings law by requiring compensation where state regulations result in a loss of all economically beneficial use for a property.[60] *Lucas*, like *Pennsylvania Coal*, places major import on "the extent of the diminution" of the property in determining whether "the legislature has gone beyond its constitutional power."[61] While the decision upheld a broad exception for nuisance law and other exercises of state police power, *Lucas*'s holding nevertheless expands the legislature's responsibility to compensate landowners in the nuisance context.[62]

Following *Lucas*, many courts reevaluated whether the use of nuisance law in certain urban renewal injunctive efforts violated the Takings Clause.[63] Several scholars expressed concern that nuisance proceedings against property owners who lack knowledge of their tenants' illegal actions might fall outside the *Lucas* Takings Clause exception for the state exercise of police power, including regulation of public nuisances.[64] While these concerns resulted in some favorable decisions for property owners, public nuisance law nevertheless continues to be a primary urban order-control technique.

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60. 505 U.S. 1003, 1030 (1992).

61. *Pennsylvania Coal*, 260 U.S. at 413; *Lucas*, 505 U.S. at 1030–31.

62. *See, e.g.*, John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 28–29 (1993) (arguing that *Lucas* impinges upon the legislature's sovereignty in nuisance and property regulation under the guise of its Takings Clause power).

63. *See, e.g.*, Becker v. State, 767 A.2d 816, 821–22 (Md. 2001) ("[A]n injunction abating nuisance 'should go no further than is absolutely necessary . . . .'" (citation omitted)); State *ex rel.* Pizza v. Rezcallah, 702 N.E.2d 81, 81 (Ohio 1998) (holding the closure of property as part of nuisance abatement procedure to constitute a compensable taking because the owner was innocent); City of Cincinnati *ex rel.* Cosgrove v. Grogan, 753 N.E.2d 256, 256, 267 (Ohio Ct. App. 2001) (granting innocent owners constitutional protection from uncompensated closure); City of Erie v. Stelmack, 780 A.2d 824, 827 (Pa. Commw. Ct. 2001) (establishing that the remedy to abate nuisance should be shaped to correspond to the nature and extent of the nuisance to avoid being purely punitive); City of Seattle v. McCoy, 4 P.3d 159, 170 (Wash. Ct. App. 2000) (granting compensation because the innocent owner was denied the beneficial use of the property for a full year).

64. *See* Carmon M. Harvey, Comment, *Protecting the Innocent Property Owner: Takings Law in the Nuisance Abatement Context*, 75 TEMP. L. REV. 635, 637 (2002) (arguing that courts should utilize an ad hoc inquiry including consideration of the innocence of a property owner in determining whether a nuisance action constitutes a taking).

3. The Modern Definitions of "Public Nuisance": A Tripartite Conceptual Framework

The *Restatement (Second) of Torts* defines a public nuisance as "an unreasonable interference with a right common to the general public."[65] The damages in public nuisance actions can be either monetary or injunctive and courts must weigh the gravity of the harm against the utility of the conduct.[66] Up until this point, this Note has treated public nuisance law as a unified body of law for the purposes of understanding the parameters of judicial scrutiny of this unique form of property regulation. Apart from the similarities mentioned above, however, public nuisance actions can be divided into three distinct types of actions: publicly brought criminal actions, publicly brought civil actions, and privately brought civil actions. The differences between the actions are significant and the remainder of this Note focuses on the shortcomings of publicly brought civil actions, and on possible reforms.

a. Publicly Brought Criminal Actions

As mentioned above, public nuisance law originated as a criminal action.[67] Most states have incorporated this common law crime into their statutes and prosecute traditional behavioral nuisances,[68] as well as other modern statutory interpretations defining private invasions of a public right.[69] Public nuisance statutes that enumerate specific acts constituting the offense usually invoke strict liability, whereas statutes incorporating the common law offense without specificity require negligence or some other heightened mens rea.[70]

b. Publicly Brought Civil Actions

Public nuisance actions initiated by local governments in civil court are perhaps the most common application of modern public nuisance law.[71] In these actions, city or county actors bring civil or administrative actions against property owners to

65. RESTATEMENT (SECOND) OF TORTS § 821B (1979).
66. *Id.*
67. *Id.*
68. *Id.*
69. *See, e.g.*, Hedges, *supra* note 6; *Oakland*, *supra* note 9 (cataloging permutations of public nuisance statutes designed to reach subjects as strange and varied as dog ownership and housing for sex offenders).
70. RESTATEMENT (SECOND) OF TORTS § 821B (1979).
71. *See id.* § 821C, cmt. j.

seek injunctive relief, normally for either abatement of property conditions or, less frequently, behavioral nuisances.[72] Because of the differing standard of proof in civil court—preponderance of the evidence rather than beyond a reasonable doubt—state and local actors wishing to avoid the strictures of the criminal process find this remedy attractive.[73]

c. Privately Brought Civil Actions

In order for a private actor to bring a public nuisance action, courts apply the special injury rule, requiring that an individual suffer a harm "of a kind different from that suffered by other members of the public exercising the right common to the general public."[74] The *Restatement (Second) of Torts* further suggests that the person "have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action."[75] This action differs from the two above in that it involves private individuals as plaintiffs, rather than state actors, with implications in both the resources for prosecution and the types of remedies available given the venue in civil courts.

The remainder of this Note focuses on the use of the second type of public nuisance law—publicly brought nuisance actions in civil courts. This is the predominant method in urban property control,[76] and its differences from other forms of public nuisance law present dangerous consequences for poor and minority tenants in modern cities.

D. URBAN RENEWAL: A NEW APPLICATION OF PUBLIC NUISANCE LAW

The use of nuisance statutes to evict tenants from rental housing is a relatively new phenomenon in American cities. Fueled by the popular "broken windows" view that disorder en-

72. Garnett, *supra* note 16, at 20–21.

73. *Id.* (noting the flexibility inherent in such remedies); *see also* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1329 (1991) (noting the adverse effect on individual rights caused by civil prosecution of criminal acts).

74. RESTATEMENT (SECOND) OF TORTS § 821C (1979). Treatise writers have named this limitation the "special injury rule." Hennigan, *supra* note 37, at 131.

75. RESTATEMENT (SECOND) OF TORTS § 821C (1979).

76. *See* PROSSER & KEETON, *supra* note 13, at 643.

courages further disorder and lawlessness,[77] many cities over the last several decades have attempted to reclaim their neighborhoods from drugs and disrepair by refusing to tolerate any appearance of disorder.[78] The broken windows movement began with increased community patrols and emphasized maintaining public order, such as by strictly enforcing vandalism and panhandling laws.[79] Initially perceived as a great success, many cities expanded their efforts to property control by using condemnation to shut down so-called problem properties.[80] After running into Takings Clause problems in the use of condemnation, many cities turned to public nuisance law to address problems traditionally within the purview of criminal law.[81]

In addition to shoring up public enforcement, many states modified their landlord-tenant law to give landlords and cities more power to evict tenants they suspected of drug-related crimes. Many state legislatures created a statutory right to seek eviction of such tenants,[82] though the more aggressive statutes did not survive judicial scrutiny.[83] The Supreme Court recently affirmed the Department of Housing and Urban Development's use of lease provisions that authorize no-fault evic-

77. *See* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29–31 (proposing a public order model where decline and lack of public order spurs further disorder in neighborhoods).

78. *See* Garnett, *supra* note 16, at 1–6 (describing the impact of the theory on neighborhood order initiatives).

79. *Id.*; *see, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 41 (1999) (affirming an innovative Chicago ordinance that allowed police to disperse crowds on streets where the police believed that drugs might be involved).

80. Garnett, *supra* note 16. *But see* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 301–39, 377–86 (1998) (arguing that the community policing model fails to deter crime); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 775–89 (1999) (arguing that order-maintenance efforts are based on faulty sociology and that legislatures should reconsider the racial stereotypes they enforce).

81. Garnett, *supra* note 16, at 20–21.

82. *See, e.g.*, CONN. GEN. STAT. § 47a-15 (2006) (allowing eviction for specified serious nuisances, including drug use or sale); The Residential Drug-Related Evictions Act of 1990, D.C. CODE § 42-3601 to -3610 (2001).

83. *See* Cook v. City of Buena Park, 126 Cal. App. 4th 1 (2005) (affirming the finding of a procedural due process violation in a city ordinance *obliging* landlords to initiate eviction proceedings against all the occupants of a rental unit if the chief of police suspected that a tenant was engaging in or allowing gang-related crime, illegal drug activity, or drug-related nuisance in or near rental property).

tion for drug activity, adopting the rather broad reasoning that the regulation is authorized by the government's power to abate nuisances.[84] This decision is especially notable since the Court refused to limit its holding to the context of government landlords. The Court reasoned instead that "[s]uch no-fault eviction is a common incident of tenant responsibility under normal landlord-tenant law and practice."[85] Such public nuisance statutes—and the case law interpreting them—increase the ability of landlords, neighbors, and public authorities to more aggressively prosecute perceived disorder in urban neighborhoods.

Under the problem property model currently operating in most major cities, "a public nuisance case results from complaints from the public about a nuisance condition, subject to the attorney general's independent assessment whether a public nuisance exists."[86] Awareness of nuisance conditions arises from either direct law enforcement observation or from community input and pressure about neighborhood problems.[87] A state or city attorney then determines whether it will file a criminal action against the persons involved or whether it will seek injunctive relief, such as eviction or temporary closure of the property. Part II considers the consequences when public actors prosecute these violations in civil court.

II. RECONSIDERING THE CONSEQUENCES: PUBLICLY BROUGHT CIVIL PUBLIC NUISANCE ACTIONS AND URBAN NEIGHBORHOOD REVITALIZATION

This Part deconstructs current urban public nuisance policy to demonstrate the clear need for widespread public and private sector reforms. Part II begins by debunking the broken windows assumption, addressing the methodological problems concerning public actors in the civil arena, and highlighting the

84. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002).

85. *Id.* (internal quotation marks omitted).

86. Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 ALB. L. REV. 359, 384 (1990).

87. *See, e.g.*, Dep't of Safety and Inspections, How to Make a Housing Complaint, http://www.stpaul.gov/depts/dsi/codeinsp/protocols.html (last visited Dec. 4, 2007) (explaining reporting methods for neighbors to strategize with police to shut down properties); *see also* JEFFREY R. HENIG, NEIGHBORHOOD MOBILIZATION: REDEVELOPMENT AND RESPONSE 40–72 (1982) (offering a more theoretical account of the role of community input and mobilization in neighborhood redevelopment).

Takings Clause problems inherent in the current public nuisance system. This Part then discusses the economic inefficiencies of the current mode of enforcement and the sociological problems inherent in this type of intervention. These weaknesses form a basis for the public and private reforms discussed in Part III.

A. DEBUNKING THE BROKEN WINDOWS ASSUMPTION

The assumptions that underlie publicly brought civil actions are particularly vulnerable to attack. The rule that a public nuisance must constitute something more than multiple private nuisances was established long before *Pennsylvania Coal*.[88] Since private actors were first empowered to bring public nuisance actions, courts have imposed the special injury rule and other limiting doctrines to avoid giving the force (and superior injunctive remedies) of public matters to private disputes.[89] Publicly brought civil actions, however, do not require plaintiffs to demonstrate the public nature of the matter[90] because of the assumption that public actors act in the public interest.[91] However, judicial faith in public actors is not limitless.[92]

The rationale behind publicly brought civil public nuisance actions is similar to broken windows theory. Like the broken windows theory, publicly brought civil public nuisance actions assume that the behavior of a few individuals can have such a pervasive effect not only on neighbors, but on a group of people so large that multiple private actions cannot effectively resolve the dispute.[93] It is because of this assumption that courts have not imposed *Pennsylvania Coal*'s rule on municipal actors who

88. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public." (citing Wesson v. Washburn Iron Co., 95 Mass. (13 Allen) 95, 103 (1866))).

89. *See* HORWITZ, *supra* note 26, at 74–80; Kurtz, *supra* note 25, at 629–51; Lewin, *supra* note 18, at 197; *see also* RESTATEMENT (SECOND) OF TORTS § 821C (1979).

90. *Compare* RESTATEMENT (SECOND) OF TORTS § 821B (1979) (setting forth a simple definition for public nuisance as "an unreasonable interference with a right common to the general public"), *with id.* § 821C (adding the so-called special injury requirement for individuals to maintain a public nuisance action).

91. *See, e.g.*, *Pennsylvania Coal*, 260 U.S. at 415–16.

92. *See id.*

93. Garnett, *supra* note 16, at 1–6, 20.

bring such suits.[94] This approach has gone practically unchallenged in both courts and academia;[95] however, there is little philosophical or empirical support for this assumption.

From a philosophical perspective, the central problem with the broken windows theory is that it assumes there are two classes of people—the disorderly and the orderly—and that these categories are not fungible.[96] Under the broken windows theory, orderly people move out of a neighborhood at the first appearance of disorder.[97] The disorderly then move in and the neighborhood subsequently deteriorates.[98] This supposition, however, ignores the complexity and particularly flexible nature of human behavior.[99] The theory also fails to account for confounding variables such as increased police force sizes and numerous sociological factors of the populations where order-maintenance methods have been studied.[100]

Acknowledging the weaknesses of the broken windows theory sheds new light on the public nuisance debate and challenges the assumption that the effects of private behavior are indeed so pervasive as to make an individual's private actions an inadequate remedy. Without the support of the broken windows assumption, urban renewal proponents must prove that a problem property or neighbor is a larger problem than a few citizens could adequately address in a private nuisance action.[101] With the problem thus defined, the support for publicly brought private nuisance actions is far less persuasive than its proponents suggest.

B. THE METHODOLOGICAL PROBLEM: PUBLIC ACTORS IN THE CIVIL ARENA

The above discussion highlights the problems with the broken windows assumption that underlies public nuisance intervention. There is an equally troubling methodological problem, however, with publicly brought civil actions compared to

94. *Id.*

95. *See* Harcourt, *supra* note 80, at 293 (noting the lack of scholarly challenges to the broken windows assumption).

96. *Id.* at 297–301.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 308–39.

101. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413–14 (1922) (establishing that multiple private nuisances do not constitute a public nuisance).

the criminal remedies available to public actors. The use of criminal law in the civil context is a pervasive trend in modern law,[102] and publicly brought civil public nuisance actions are no exception. Civil criminal remedies remove procedural and substantive protections that defendants enjoy under criminal law while subjecting those civil defendants to severe injunctive measures.[103]

While no one questions the right of public actors to seek injunctive relief, the use of *civil* injunctive actions in lieu of statutory criminal remedies for public nuisance violations presents distinct problems. In many cases, statutes authorizing publicly brought civil actions incorporate the criminal law directly but do not address the different burdens of proof and procedural protections of criminal statutes, creating ambiguity and uncertainty.[104] Civil remedies, if they act sufficiently similar to criminal sanctions, are subject to the strictures of criminal law guarantees.[105] The most common factors used to determine whether a public actor is using a civil remedy for criminal or civil purposes are legislative intent, severity of sanctions, stigma, and intent to punish.[106] Application of each of these tests to publicly brought civil public nuisance actions yields the same conclusion: public actors under the current public nuisance regime use the civil law for criminal law functions. Therefore, defendants should be guaranteed the safeguards of criminal law.

The legislative goal driving public nuisance law is order or property control. Thus, public nuisance laws likely lack the intent to create a criminal remedy or to punish defendants.[107] Even conceding a lack of legislative intent to use the civil law for criminal purposes, however, the loss of housing for both tenants and homeowners constitutes a severe penalty. In addition, the administrative or civil court proceedings utilized to determine whether a public nuisance exists impose considerable stigma on the property occupants and/or owners being prosecuted. Though eviction or other injunctive relief differ from a finding of guilt for a criminal offense, the allocation of guilt in a

102. Cheh, *supra* note 73, at 1325–28.

103. *Id.* at 1325–30.

104. *Id.*; *see, e.g.*, ST. PAUL, MINN., ADMIN. CODE § 91.01 (2007), *available at* http://www.ci.stpaul.mn.us/code/ac091.html (referencing state public nuisance statutes, but at the same time redefining some key terms while failing to define others).

105. Cheh, *supra* note 73, at 1330–31.

106. *Id.*

107. Garnett, *supra* note 16, at 20.

civil proceeding is every bit as stigmatizing for its assignment of blame and creation of temporary homelessness.

Though some critics disapprove of the subjective nature of balancing between factors,[108] the severity of punishment and stigma wrought by publicly brought civil actions overwhelmingly outweigh the weak evidence of legislative intent. Expansive remedies come with a cost. Dissolving the distinction between criminal and civil courts results in defendants' loss of civil liberties and procedural rights because of the increased power and discretion given to government actors.[109] The further structural advantages enjoyed by repeat players such as governments[110] in all aspects of litigation counsel against the dilution of procedural guarantees of one-shot defendants.

C. THE TAKINGS CLAUSE AND THE LIMITS OF STATE AND LOCAL POLICE POWER

Theoretically, courts do not subject state and local police power to the strictures of takings law—a valid exercise of police power can never be a taking.[111] However, this general rule is not as clear in practice. Regulatory takings jurisprudence attempts to draw the line between the exercise of police power and state action that requires compensation.[112] Given the importance of this distinction, evaluating the use of public nuisance law by public actors requires consideration of both the substance of takings jurisprudence and the boundaries of police power.

1. Loss of Economic Benefit for Inner-City Owners *and* Residents

Although most recent cases focus on the losses of inner-city property owners in the public nuisance realm, both landowners *and* tenants lose economic benefits when public actors pursue injunctive relief for public nuisances. Property owners face

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108. *See* Cheh, *supra* note 73, at 1330–31.

109. *See* Hennigan, *supra* note 37, at 146–48 (explaining the significance of the Progressive Era debate over the scope of nuisance law and the consequences on civil liberties).

110. Galanter, *supra* note 11, at 19–21.

111. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025–26 (1992) (arguing that under regulatory takings jurisprudence, the language "'prevention of harmful use' was merely [an] early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value").

112. *Id.*

Draconian penalties such as indefinite revocation of their rental license and mandatory shut-down periods due to drug activity on their properties.[113] While it is true that most landlords know that they are subject to such regulations when they take title to their property and acquire their rental registration, it is equally clear that a landowner's loss of rental value qualifies as a lost economic benefit under a plain reading of the *Lucas* standard.[114] The next step in the Takings Clause analysis post-*Lucas* is to determine whether the regulations are a valid exercise of state police power.

The modern interpretation of lease agreements focuses on their contractual nature rather than the property interests that dominated common law jurisprudence.[115] Much of the discussion of lost economic benefits post-*Lucas*, however, assumes that the only party with a stake in challenges to nuisance statutes is the landowner.[116] This focus derives from the fact that landlords are more likely parties to challenge nuisance decisions, whereas one-shot players like poor urban tenants rarely have the resources to litigate.[117] In addition, tenants have little financial incentive to litigate given the relatively small financial value of their tenancy compared to the costs of the extensive appeals necessary to enact rule change.[118] Acknowledging the contractual interest of tenants in their property, however, affirms that publicly brought civil nuisance prosecution constitutes a loss of economic benefit for tenants like Monica and Shawn under *Lucas* and thus deserves rigorous protection under the Takings Clause.[119] The only remaining barrier to such protection is the issue of whether tenants' losses fall under the police power exception to the Takings Clause.

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113. *See, e.g.*, City of Mankato v. Mahoney, 542 N.W.2d 689, 690 (Minn. Ct. App. 1996) (upholding the revocation of a rental certificate and applying a deferential rational basis test to city determinations of nuisance and other property issues).

114. *Lucas*, 505 U.S. at 1030.

115. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 456–58 (5th ed. 2002).

116. *See, e.g.*, Harvey, *supra* note 64, at 637 (confining his Takings Clause inquiry to the narrow subset of innocent property owners in the case of urban public nuisance actions).

117. Galanter, *supra* note 11, at 14–18.

118. *Id.*

119. U.S. CONST. amend. V.

2. Take It to the Limit: The Boundaries of State Police Power

Lucas dealt with police regulation in the narrow situation where a regulation was not part of the "bundle of rights" of property ownership under state law at the time of acquisition.[120] Courts must also determine, however, when police power transgresses into a regulatory taking requiring compensation regardless of when a state legislature approves a rule depriving an individual of the economic benefit of their property. Unfortunately, the law in this area is underdeveloped, particularly with regard to public nuisance statutes. But just as the *Pennsylvania Coal* Court was willing to limit the scope of nuisance law, modern courts should also consider whether a given expansion of nuisance law exceeds the boundaries of state police power in the realm of regulatory takings. Thus, the circular Takings Clause discussion necessarily returns to the definitional limits of public nuisance law discussed above.

D. PUBLIC OR PRIVATE INTEREST?: THE ECONOMIC EFFICIENCY ARGUMENT

Given the limited judicial scrutiny devoted to public nuisance claims,[121] it is important to examine the policy ramifications of public nuisance law in action. The absence of judicial scrutiny flows from a long-held belief that legislatures are in the best position to "balance the advantages and disadvantages" in a particular field of regulation.[122] Showing that legislatures are not particularly adept at regulating a field bolsters the argument for both judicial intervention and legislative reform, especially if the law is economically ineffective.[123] Since legislators are unsuccessfully managing public nuisance law, it is important to evaluate whether public nuisance legislation takes accurate account of considerations of economic efficiency.

In examining the economic efficiency of a particular law, economists look first at whether a rule "maximizes the aggregate dollar value of goods, services, and other sources of utili-

120. *See Lucas*, 505 U.S. at 1006–07, 1027–32.

121. *See* Garnett, *supra* note 16, at 20, 23–24.

122. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955).

123. If legislatures intend to impose economic inefficiency, that is another matter; they are certainly free to subsidize certain behavior or create inefficiencies if those actions are deemed necessary to the law's purpose. Imposing economic inefficiency thoughtlessly, however, argues against the presumption of deference to legislatures because it imputes irresponsibility to the part of the body supposedly best-equipped to regulate in the field.

ty."[124] Legal rules may affect utility by establishing incentives to avoid conflict.[125] These rules may also alter the costs and profitability of activities by forcing actors to internalize the external costs of their behavior.[126] It is clear that legislatures have not adequately considered these economic principles in the field of public nuisance law.

Publicly brought civil public nuisance actions allow private actors to utilize the nuisance process to push their private agendas when they would not personally pursue litigation. Public actors likewise hedge their bets by not investing in the traditional criminal process. In each of these cases, the entitled parties do not internalize the costs of their behavior, creating external costs for others. Private citizens do not take into account whether a private lawsuit would be more efficient given the availability of "community input," which encourages private citizens to contact a designated agency and rally together to declare neighbors' property a public nuisance.[127] Likewise, public actors do not have to consider the merits of their case as seriously as they would if they chose to bring a criminal action due to the procedural differences of the venues. In addition to these externalities, public nuisance regulation also discourages urban property investment by pricing out investors due to the uncertainty of intervention,[128] imposing further costs on affected neighborhoods. While governments may articulate valid policy reasons for choosing to allow these economic inefficiencies, other detrimental policy implications—as discussed below—further counsel against publicly brought civil public nuisance actions.

E. NEIGHBORHOOD COMPOSITION, RACE ASSUMPTIONS, AND THE SOCIAL CONSEQUENCES OF PUBLIC NUISANCE INTERVENTION

The success of the Red Light Abatement movement in the Progressive Era demonstrates the power of public nuisance law to change neighborhood composition.[129] The success of behavioral public nuisance efforts, however, depends on whether they merely disperse classes of people or whether the laws ac-

124. Lewin, *supra* note 18, at 236.
125. *Id.* at 236–37.
126. *Id.* at 237.
127. *See, e.g.*, Dep't of Safety and Inspections, *supra* note 87.
128. *See* Garnett, *supra* note 16, at 26, 50–52.
129. Hennigan, *supra* note 37, at 126–27.

tually decrease or deter the regulated behavior.[130] If injunctive prosecution only disperses "problem" individuals rather than deterring them from repeating the behavior, then public nuisance prosecution merely relocates problem tenants, forcing new communities to deal with the same public order problems.

Resolving this dilemma requires empirical research, though the data is less than conclusive due to the difficulty in tracking individuals who are evicted or otherwise moved by threatened or actual prosecution under public nuisance law. Nevertheless, sociological literature generally answers that such intervention causes dispersion rather than deterrence, though the degree of dispersion varies based on the particular circumstances.[131] The result of the dispersive nature of public nuisance regulation is not only economic inefficiency, but also unjust social burdens for both the neighborhoods where public nuisance regulation is strongest and the neighborhoods where "problem" individuals relocate.

Understanding whether public nuisance law is effective in operation also requires examination of how public nuisance law is driven by mistaken racial assumptions. According to many critics of the broken windows theory, order-maintenance efforts consistently fail to consider the racial stereotypes they enforce.[132] In these critics' view, "order-maintenance policing . . . ignore[s] the disturbing potential for these practices to enforce and magnify racist norms of presumed Black criminality."[133] This presumption of "Black criminality" can lead to increased policing of minority groups, especially given the amount of statutory ambiguity and prosecutorial discretion given to law enforcement personnel.[134]

Further complicating the discussion of race are the disparate effects public order prosecution imposes on racial minorities. No reasonable person denies that so-called urban renewal efforts have extremely racially disparate effects on minority groups.[135] Proponents of order-control efforts claim that this

130. *See id.* at 154, 193–96.

131. *Id.* at 127 (discussing dispersion in the closing of red-light districts due to public nuisance prosecution).

132. Roberts, *supra* note 80, at 779–80, 799–801; *see also* Garnett, *supra* note 16, at 52–53 (discussing the resulting "us versus them" mentality caused by racial disparities).

133. Roberts, *supra* note 80, at 779–80.

134. *Id.* at 780–89 (discussing the consequences of statutory vagueness on prosecution of minority groups).

135. *See id.* at 779; *see also* Harcourt, *supra* note 80, at 299 (observing the

disparate impact on minorities does not indicate a discriminatory purpose; instead, it results from the legitimate prosecution of wrongdoers, and concentrated poverty and social effects are often associated with racial groups.[136] Others argue—somewhat more insidiously—that disparities should not matter; the prosecution of criminals need not be racially balanced if the offenders are concentrated in racial groups.[137] But racial animus can be inferred by the fact that community racism often fuels public nuisance prosecution, especially where cities utilize community input systems.[138] The fact that racism underlies a system that operates on a lower burden of proof, informal administrative hearings, and potentially severe penalties strongly suggests that lawmakers should reform current practices.[139]

F. SAFEGUARDING RIGHTS OF VULNERABLE POPULATIONS

Publicly brought civil nuisance actions present the problem of evading the procedural strictures of the criminal law and putting the force of the state behind private disputes that are often motivated by racial biases.[140] Ideally, this approach aims to protect the urban poor who are legitimately concerned with their neighborhoods but lack the resources to initiate public nuisance actions. This method actually hurts poor individuals accused of public nuisance violations, however, because of the decreased procedural protections[141] and the fact that they must litigate against the enormous resources of public actors who are repeat players.[142] It is difficult to resolve which interest is the strongest between poor defendants and poor inner-city residents, since both are particularly vulnerable and thus will be strongly affected by the allocation of legal entitlements. But constant public nuisance intervention in cities prices out urban investment;[143] given the instability of property investment in volatile neighborhoods, regulation should be a last resort.

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disparity between high arrest rates of minorities and their relative proportion in urban populations).

136. *See* Roberts, *supra* note 80, at 819–22 (discussing the theme of "Law Enforcement as Black Liberation" among criminal justice and race scholars).

137. *See id.* at 820–21.

138. Garnett, *supra* note 16, at 50–53; *see also* HENIG, *supra* note 87, at 40–72.

139. Garnett, *supra* note 16, at 53.

140. Cheh, *supra* note 73, at 1325–26, 1329–30.

141. *See id.*

142. *See* Galanter, *supra* note 11, at 19–20.

143. *See* Garnett, *supra* note 16, at 50–51.

Even in the absence of conclusive empirical evidence about dispersion, residents in gentrifying urban neighborhoods greatly fear displacement and thus view any public intervention as a socioeconomic tool designed to exact their removal from valuable real estate.[144] This opposition is rooted in a sense of shared community and resistance to the influence of outsiders in changing the community without their input.[145] Though perception is not necessarily the same thing as reality, public nuisance regulation can lead to gentrification when the dispersal of problem individuals forces community change by clearing away the barriers that stand in the way of investment. Without protective measures in place, the changes in communities that accompany gentrification ultimately price out the poor who have weathered the community through difficult times.[146] This perverse reversal of the broken windows hypothesis creates a situation where the "orderly" poor are unable to live in their communities once the disorderly individuals are displaced.

When viewed alongside the legal, economic, and social critiques above, the pricing-out and gentrifying effects of public nuisance regulation tip the scale against the current use of publicly brought civil public nuisance actions. Part III constructs a policy system consisting of short-term statutory reform and a long-term public-private partnership that preserves the democratic value of local control over property while remedying the current deficiencies of public nuisance prosecution.

III. TOWARD A NEW URBAN PUBLIC ORDER REGIME: POLICY SOLUTIONS

Given the reality of the broad discretion in state and local property regulation, the decision about how best to reform urban order-control efforts is—at least on a practical level—an issue for legislatures, not courts.[147] The serious legal, social, and economic problems with the current urban order regime, how-

144. *See* LANCE FREEMAN, THERE GOES THE 'HOOD: VIEWS OF GENTRIFICATION FROM THE GROUND UP 162–64 (2006).

145. *See id.* at 163 (describing how fear of displacement connotes loss of community).

146. *See id.*; *see also* Biliana Cicin-Sain, *The Costs and Benefits of Neighborhood Revitalization*, *in* URBAN REVITALIZATION 49, 56 (Donald B. Rosenthal ed., 1980).

147. *See supra* notes 30–56 and accompanying text (discussing the broad deference shown by courts to states and municipal bodies in local property regulation).

ever, indicate that states and municipalities should look for more creative ways to maintain public order in modern cities. These proposed reforms would be accomplished at the state level, given the lack of a federal interest in local property regulation. Though this reality renders uniform reform impossible unless the American Law Institute or other national legal associations are able to press states to enact a similar package of public nuisance reforms, the benefits to states that recognize the problems in their current public nuisance statutes encourages at least gradual reform.

The discussion below begins with necessary but short-term reforms to public nuisance law. These reforms include the suspension of publicly brought civil public nuisance actions, temporary deregulation of privately brought public nuisance actions, and the incorporation of uniform procedural and legal protections for civil and criminal courts. Reforming urban public nuisance law, however, requires both public *and* private participation to effectively maintain public order in modern cities. This Part concludes with a novel proposal for a public-private enforcement structure along the lines of Title VII[148] that reintroduces economic and market mechanisms to better safeguard the rights of both the accused and the accuser in civil public nuisance actions.

A. NECESSARY SHORT-TERM PUBLIC REFORMS TO PUBLIC NUISANCE LAW

States and cities have innumerable policy options to combat public order problems. This Section begins with legislative and executive reforms to public nuisance law that are the easiest to implement, both in terms of political feasibility and simplicity. The necessary short-term reforms include suspending public civil actions, temporarily deregulating privately brought public nuisance actions, and incorporating uniform procedural and legal protections in both civil and criminal courts. These solutions swiftly recognize and remedy the urgency of the problems caused by the current public nuisance regime. These are not long-term solutions, however, a fact evidenced not only by their individual shortcomings, but also from the possibility of superior results when the private sector gets involved in the enforcement process.

148. *See* 42 U.S.C. § 2000e (2000 & Supp. IV 2006).

1. The First Step: Suspend Publicly Brought Civil Public Nuisance Actions

The first and most obvious policy option for localities is simple. Public nuisance definitions should be revised to prohibit publicly brought civil public nuisance actions. This could take place through one of two methods. First, states and municipalities could directly revise public nuisance statutes to exclude publicly brought civil public nuisance actions. Alternatively, states and municipal governments could issue executive orders to local law enforcement and city and state attorneys to cease civil prosecution of public nuisance actions by public actors. Under such policies, public actors would be required to bring criminal actions or leave the civil prosecution to private citizens. This scheme requires changing statutes but does not require the creation of new laws, thus presenting a logical starting point for reform.

The primary advantage of this policy is that it forces public actors to build a strong case before going forward with prosecution. Public actors must take into account the procedural protections for defendants built into the criminal system. In addition, criminal prosecution requires strict attention to the statutory definition of the public nuisance offense. Minnesota, for example, requires two or more specified incidents of behavior, clear and convincing evidence, and a thirty-day written notice summarizing the nuisance and allowing an opportunity to abate the nuisance before an action is filed.[149] These requirements protect defendants and prevent the state from acting recklessly. Though bringing a criminal case is time-consuming because of the numerous protections built into the system for defendants and the large caseloads of the judges and lawyers in the criminal system, these requirements protect defendants and prevent the state from acting recklessly. Revised statutes or executive orders should use the Minnesota statute as a model by clearly specifying similar factors to facilitate faster prosecution.

Suspension of publicly brought civil actions also has the advantage of encouraging economic efficiency. In this scenario, citizens must bear the costs of litigation and thus are less likely to press forward unless they desire the result enough to bear the consequences. This strength, however, may also advantage the wealthy to the detriment of the poor who either cannot af-

149. MINN. STAT. § 617.81 (2004).

ford to combat nuisances in their own jurisdiction or to defend themselves if wrongfully accused. After all, it is often poor communities that are forced to bear the costs created by an influx of "problem" tenants displaced by order-control efforts in other neighborhoods.[150] Thus, while this suggested first step is perhaps the most straightforward policy to implement because it does not require legislative innovation, it will likely lead to underenforcement of public nuisance statutes. However, these long-term economic disadvantages are far outweighed by the necessity of short-term change to protect defendants until a private attorney general enforcement scheme is in place to more fully safeguard the interests of poor plaintiffs and defendants.

2. The Private Deregulation Approach: The Progressive Era (Temporarily) Revisited

If the primary deficiency of the current public nuisance approach is its lack of private involvement, legislatures should consider ways to facilitate privately brought public nuisance actions. The simplest way to accomplish this objective would be to revise public nuisance statutes to remove the statutory and common law barriers that make private actions difficult. In the Progressive Era, legislatures accomplished these objectives by eliminating the special injury rule and other requirements of privately brought public nuisance actions to facilitate enforcement of public rights.[151] By removing these barriers, private citizens would be better able to pursue cases the government cannot.

As the Progressive Era demonstrates, however, such deregulation may also create negative consequences resulting from the increased availability of the remedy. Overzealous tenants with better financial or organizational resources may bully less advantaged citizens.[152] Such an approach would create serious problems due to its majority rule methods and lack of public accountability. Removal of barriers without incorporating procedural protections allows organized and economically advantaged groups to repeat the same problems caused by overzealous public enforcement in civil court. Deregulation also

150. *See, e.g.*, Hennigan, *supra* note 37, at 196.
151. MACKEY, *supra* note 39, at 126–27.
152. Hennigan, *supra* note 37, at 125, 127.

leads to further blurring of the public/private distinction, a condition which threatens civil liberties if left unconstrained.[153]

Given these weaknesses, a pure deregulation policy poses the same overuse weaknesses of Progressive Era reforms and falls short of protecting vulnerable urban tenants and owners. If included in an overall reform package, however, including suspension of public actions in civil court and the procedural remedies discussed below, deregulation is much more palatable as a short-term reform to public nuisance law. Deregulation allows private citizens to fill the temporary enforcement gap, but the proposed private attorney general enforcement scheme will ensure that future private involvement accurately takes into account economic consequences.

3. The Direct Remedy: Incorporating Uniform Procedural and Legal Protections for Public Nuisance Prosecution in Criminal *and* Civil Court

Short-term reforms to public nuisance prosecution should also address the weaknesses discussed in Part II while still allowing public actors to pursue civil remedies. The "direct remedy" reform would require states and municipalities to revise and harmonize their statutes, clarifying what is currently a mystifying area of law[154] by incorporating procedural and legal protections. The Minnesota criminal public nuisance statute discussed above could serve as a model because it avoids indiscriminate prosecution by requiring multiple offenses of a clearly defined set of circumstances constituting nuisance behavior.[155] Uniform revisions by states and their local subdivisions to public nuisance law and enforcement would eliminate the problems of inadequate legal protections for defendants without confining public actors to bringing only criminal actions or sponsoring inefficient private enforcement.

In addition to eliminating the problems caused by legal uncertainty, legislatures should strongly consider increasing procedural protections for defendants, regardless of whether the plaintiff or prosecutor is a public or private entity. A logical starting point would be designating housing courts as the proper venue for public nuisance disputes. Housing courts are available in most urban areas and are designed to speed up the judicial process while safeguarding rights and ensuring fair

153. *See id.* at 146–47.

154. *See* PROSSER & KEETON, *supra* note 13, at 646.

155. MINN. STAT. § 617.81 (2004).

proceedings.[156] These courts allow for faster resolution than criminal courts and are better equipped to understand the particular legal issues than administrative bodies or district courts.[157] These protections force public actors to make sure that they have a strong case before they attempt to evict tenants.[158] Finally, local public nuisance ordinances would also benefit from a higher burden of proof, since they often incorporate state criminal law without clear reference to what burden of proof applies in the civil context.[159]

Without these safeguards, nuisance law will continue to serve as an easy way for law enforcement officers to circumvent landlord-tenant law and constitutional requirements by imposing severe injunctive penalties that mimic criminal sanctions without allowing for the same procedural rights. But even with the incorporation of procedural reforms, there is still an enforcement gap created by the cost of private litigation when public actors do not have enough information or resources to prosecute problem tenants. The discussion below suggests that introduction of market mechanisms by a private attorney general scheme presents the best long-term reform of privately brought civil public nuisance actions, because it promises to close the enforcement gap and encourage economic efficiency.

B. THE CARROT AND THE STICK: A PUBLIC-PRIVATE PARTNERSHIP

The prior discussion of private deregulation illustrates the problems that would result if public nuisance prosecution is completely turned over to private entities. Pure deregulation may advantage the wealthy at the expense of poor defendants and communities and allow for abuse of procedural advantages by plaintiffs. Likewise, the suspension of publicly brought civil public nuisance actions would likely lead to underenforcement given the strictures of the criminal law and the limited public resources available for prosecution. The uniform procedural and legal reforms suggested in Part III.A.3 would help reduce these problems, but the lack of economic incentives may still

156. *See* DUKEMINIER & KRIER, *supra* note 115, at 507–08 (discussing use of summary proceedings in housing disputes).

157. *See id.*

158. *See id.*

159. *See* Cheh, *supra* note 73, at 1325–29 (discussing the typical state and local practice of utilizing civil remedies for criminal purposes).

lead to inefficient behavior by private plaintiffs and public actors alike.

The most logical solution to this remaining dilemma is to use financial incentives for private actors to bring private public nuisance suits while maintaining the common law and statutory barriers that prevent abuse. States and municipal governments should create statutes that appropriate private attorney general regimes such as Title VII[160] and *qui tam*[161] provisions (defined below) to allow successful plaintiffs to seek damages from tenants and landlords for the consequences of public nuisance violations. A modified private attorney general enforcement scheme reintroduces market mechanisms to the decision whether to prosecute, giving financial incentives to plaintiffs to pursue valid claims while allowing public actors to prosecute where the facts merit public intervention.

1. The Private Attorney General: Federal Models

The federal government resolves the tension between subsidization of meritless cases and the need for private help in filling enforcement gaps by utilizing *qui tam* and other private attorney general statutory innovations. A *qui tam* lawsuit is "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive."[162] Examples of such provisions include the False Claims Act[163] and Title VII of the Civil Rights Act of 1964.[164] These federal models provide helpful guidance for what such a public-private partnership might look like under public nuisance law.

The False Claims Act allows persons with knowledge to sue on behalf of the government in cases involving fraud against the federal government.[165] If the government declines to take the case, the individual plaintiff may go forward as a "relator"; if successful, the plaintiff will be able to collect fifteen to thirty percent of the total recovery.[166] Title VII takes a simi-

160. *See* 42 U.S.C. § 2000e (2000 & Supp. IV 2006).
161. *See* 31 U.S.C. § 3730 (2000).
162. BLACK'S LAW DICTIONARY 1282 (8th ed. 2004).
163. 31 U.S.C. § 3730.
164. 42 U.S.C. § 2000e.
165. 31 U.S.C. § 3730(b).
166. *Id.* § 3730(c)(3), (d); *see also* Carl Pacini & Michael Bret Hood, *The Role of* Qui Tam *Actions Under the False Claims Act in Preventing and Deterring Fraud Against Government*, 15 U. MIAMI BUS. L. REV. 273, 276 (2007).

lar approach for claims of employment discrimination against both public and private employers. The statute first requires submission of claims to the Equal Employment Opportunity Commission (EEOC).[167] After the EEOC evaluates the merits of the case and decides whether or not to intervene, the EEOC issues a right to sue letter to the individual plaintiffs.[168]

Such public-private partnerships facilitate increased enforcement by reallocating economic incentives and placing the power of prosecution in the hands of interested parties, not overworked government. Urban neighborhoods would benefit from a private attorney general scheme that would reform an area currently dominated by bureaucracy, entitlement approaches, and underenforcement. The discussion below examines the necessary components to translate a private attorney general enforcement structure to the public nuisance context.

2. Appropriating Private Attorney General Enforcement to Civil Public Nuisance Law

A successful private attorney general program must offer incentives to individual plaintiffs while avoiding the problem of subsidizing cases without merit. There are at least four elements required to tread this fine line: financial incentives for plaintiffs; an executive body to review complaints and intervene; financial incentives and protections for defendants; and continued procedural and legal protections for defendants.

a. Financial Incentives for Plaintiffs

The success of private nuisance actions under the current public nuisance regime is hampered by the relatively low monetary value of injunctive property actions in cases where local actors decline to pursue criminal actions.[169] To effectively encourage private enforcement, states and localities would have to create an economic incentive for private plaintiffs who successfully prosecute public nuisance violations. Placing a monetary value on the virtue of a nuisance-free neighborhood is difficult, but hardly impossible; courts routinely make these determinations. Under the False Claims Act, private plaintiffs are able to recover reasonable expenses, attorney's fees, and

167. 42 U.S.C. § 2000e-5.
168. *See id.* § 2000e-5(f)(1).
169. *See* Galanter, *supra* note 11, at 14–18.

costs for pursuing the action.[170] Public nuisance plaintiffs could recover similar compensatory damages for losses in property values, cleanup or maintenance costs, or pain and suffering, in addition to specified fines such as those available under the False Claims Act. A private enforcement statute should also create possible recovery in the form of punitive damages for especially egregious cases, such as when repeated gang violence or drug sales from a house terrorize a neighborhood.

Financial incentives mean little, however, if defendants are unable to pay for their damages. Thus, private enforcement statutes should clearly provide mechanisms to recover from both tenants and landlords by attaching a debt to the property if a landlord or property owner fails to comply with the mandates of nuisance law. If nothing else, private enforcement statutes should provide mechanisms for recovery of attorneys' fees from the defendants or from a common fund in the event that the defendants are unable to pay.[171] As has been the case in the employment discrimination context, however, law firms will be able to spread some of this risk of recovery by taking cases on a contingent fee basis given their merits.

b. An Executive Body to Review Complaints and Intervene

Private enforcement of public nuisance violations depends heavily on financial incentives. However, it is not difficult to imagine scenarios where the financial recovery is minimal but there is a great public interest in the litigation. For those situations—as well as to monitor public nuisance cases in general—states should use the EEOC as a model for a centralized state executive body to review complaints, investigate charges, and intervene when the public interest demands. The reviewing body's limited resources will force them—like the EEOC and other similar organizations[172]—to carefully consider the organization's priorities and whether private resources could adequately solve the problem.

Though the body's caseload may be constrained by time and resources, this limit may actually help public nuisance ac-

170. 31 U.S.C. § 3730(d).

171. This could take the form of either state budget grants or payment from the local bar association, which is sometimes available for clients who are defrauded by attorneys.

172. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NATIONAL ENFORCEMENT PLAN, http://www.eeoc.gov/abouteeoc/plan/nep.html (last visited Dec. 4, 2007) (noting the EEOC's limited resources).

tions by preventing public actors from acting without regard to the economic consequences of their actions. This new method of public intervention in publicly brought civil public nuisance actions ensures that frivolous and uninformed actions like the city prosecution of Monica and Shawn will not continue.

c. Financial Incentives (and Protections) for Defendants

One marked difference from the *qui tam* and employment discrimination prosecution regimes discussed above and public nuisance actions are the nature of the defendants. Unlike the employers and corporations regulated by the False Claims Act[173] or Title VII,[174] the defendants in public nuisance actions are largely individuals, with the exception of corporate landlords. Given this difference, a pure subsidy approach puts low-income defendants at risk due to their inability to pay for their defense. States and municipalities could counteract this weakness by entitling defendants to attorneys' fees in the event of their success. In addition, state and local governments could designate legal aid or public defender funds to protect individual defendants who cannot afford to defend themselves.[175] In addition, states should consider entitling defendants to damages when prosecution is in bad faith. Without these protections, privatization will simply repeat the dispersion problems of the Progressive Era and give poor urban residents like Monica and Shawn little choice but to leave at the first sign of threatened litigation.

d. Continued Procedural and Legal Protections for Defendants

The differences between Title VII, *qui tam*, and public nuisance defendants also highlight the need for procedural protections for defendants. As mentioned in Part III.A.3, these protections should mirror and perhaps expand criminal protections using the Minnesota criminal statute as a model.[176] While a private attorney general approach offers the potential of striking the balance between under- and overenforcement, pri-

173. 31 U.S.C. § 3729(a) (2000).

174. *See* 42 U.S.C. 2000e-2 (2000 & Supp. IV 2006).

175. As the opening pages of this Note make clear, legal aid offices sometimes accept cases involving civil public nuisance actions. Without an infusion of resources from state and local government to cover increased caseloads caused by a private attorney general approach, however, these programs would be unable to provide adequate defense to those in need.

176. MINN. STAT. § 617.81 (2004).

vatization schemes may negatively impact civil liberties by blurring the public/private distinction as in the Progressive Era.[177] Privatized enforcement schemes also favor repeat players and could lead to exploitation of the remedy for monetary gain, as in the recent equity skimming trend in urban neighborhoods.[178] Procedural and financial protections for defendants, however, counteract these weaknesses by preventing exploitation and overzealous prosecution because of the economic consequences of such actions and inability to succeed in weak cases.

Without private involvement in the public nuisance process, public order problems in poor urban neighborhoods may be underenforced to the detriment of those communities. However, successful private attorney general enforcement must take care to incorporate these four elements into their new enforcement structure or urban residents will pay the price.

CONCLUSION

Once the deficient assumptions of broken windows theory and faulty methodology of public order intervention are acknowledged, it is clear that takings law and policy considerations weigh against the current use of publicly brought civil public nuisance actions as an urban renewal strategy. In light of the serious weaknesses of the current public nuisance regime, legislatures must actively search for creative policies that satisfy constitutional limits, reflect better economic efficiency, and revitalize urban neighborhoods, all while still protecting their vulnerable citizens. By implementing the statutory reforms discussed above and an accompanying private attorney general scheme, legislatures may accomplish these goals by reducing the abuse of the remedy by public actors. The proposed private attorney general reform allows private actors—who are better able to account for the economic consequences of their actions—to fill the enforcement gap that exists under current public nuisance law and that will continue to exist even if

177. *See* Hennigan, *supra* note 37, at 146–47 (explaining the significance of the Progressive Era debate over the scope of nuisance law and the consequences on civil liberties).

178. Natasha Lim, *Loan Fraud Becomes More Creative as Market Slows*, MORTGAGE SERVICING NEWS, June 1, 2007, at 8 (describing the trend of predatory mortgage companies offering to help urban homeowners keep their homes if they are behind on their payments, but in the process obtaining ownership of the home and taking equity out of the home while charging the former owners exorbitant monthly payments to regain ownership).

short-term reforms are implemented. By acknowledging and remedying the systemic biases that currently characterize the realm of public nuisance law,[179] the proposed statutory reforms recalibrate the legal landscape of public nuisance prosecution to reflect societal values of both fairness and efficiency. Such systemic reform is necessary to protect vulnerable low-income residents like Monica and Shawn and ensure their inclusion in healthy, diverse urban neighborhoods.

179. *See* Galanter, *supra* note 11, at 14–18.

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